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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1459

ROBERT M. MAHONEY, JOYCE S. MAHONEY, MICHAEL MAHONEY, PATRICK MAHONEY and JEFFREY MAHONEY, d/b/a BORMON INVESTMENT COMPANY, AMERICAN LAUNDRY COMPANY and COLONIAL LINEN SERVICE,
Petitioners,

vs.

LAUNDRY, DRY CLEANING AND DYE HOUSE WORKERS INTERNATIONAL UNION, LOCAL 93 OF SPRINGFIELD, MISSOURI,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

Whether the collective bargaining agreement requires the submission to arbitration of the unresolved issues of wages and seniority which had been reopened according to the terms of the agreement.

STATEMENT OF CASE

The Union and the Employer were parties to a collective bargaining agreement (A. 9-41) which provided that it would remain in full force and effect until August 8, 1973 (A. 30). The

agreement provided that either party had the right to reopen the contract on the subjects of wages and seniority as of August 8, 1971 (A. 30). Both the Union and the Employer exercised the option provided for to reopen the contract on both seniority and wages by giving timely notice (A. 5). The parties were unable to reach an agreement (A. 6). The Union demanded that the unresolved issues be submitted to arbitration (A. 6, 7). The Employer refused to submit the unresolved issues to arbitration (A. 6, 7, 42, 43). The Employer also adopted the position that because of the no-strike provisions of the contract, the Union could not resort to a strike to enforce its position (A. 6, 7, 43, 45). Thereafter, the Union brought this declaratory judgment action, to determine whether or not the Employer was obligated to submit the unresolved issues of wages and seniority for the period from August 8, 1971, to the expiration of the contract, to arbitration, or in the alternative, whether it had a right to strike (A. 4-9). The pertinent provisions of the collective bargaining agreement are as follows:

> "*Article I. Purpose. Section 1.* It is the intent and purpose of the parties hereto, to set forth herein their basic agreement covering wages, hours of work, and conditions of employment to be observed between the parties hereto, and to provide procedures for the prompt, and equitable adjustment of all grievances and disputes arising between the Employer and the Union or any employee or employees covered by this Agreement" (A. 10).
>
> "*Article XIII. No Strike or Lockout. Section 1.* There shall be no strikes, stoppages, slowdowns, or concerted activity interrupting or interfering with production, or lockouts, for any reason whatsoever during the life of this Agreement" (A. 20).
>
> "*Article XIV. Grievance and Arbitration. Section 5.* Each party shall select an arbitrator; the Union shall be represented by an international representative, and the

Employer by its labor counsel. Should there be no agreement between the two arbitrators as to the third arbitrator, application shall be made to the Federal Mediation and Conciliation Service in Washington, D.C., for a panel of five (5) nominees. The parties shall alternate in striking two names each and the remaining shall be the impartial arbitrator. The arbitrator shall not have the power to add to, subtract from, or change the terms of the contract. The decision of a majority of the panel shall be final and binding. Each party shall bear the expense of its arbitrator; the expenses of the impartial arbitrator shall be shared equally by the parties" (A. 21-22).

"*Article XX. Termination. Section 1.* This Agreement shall remain in full force and effect until August 8, 1973, and from year to year thereafter, unless sixty (60) days prior to August 8, 1973, or any year thereafter, the Union notifies the Employer or the Employer notifies the Union of its desire to terminate or modify this Agreement. This notice must be written" (A. 30).

"*Section 2.* Either the Employer or the Union shall have the right as of August 8, 1971, to reopen for negotiation on the subject of wages and seniority only, upon either party giving written notice to the other at least sixty (60) days prior to such reopening date. In the absence of such notice, the existing conditions shall continue to remain in effect until the expiration date of the Agreement" (A. 30).

Except as set out in the above sections, the contract does not define grievances or disputes, and except as set out above, it does not contain any limits as to what is to be submitted to arbitration (A. 9-45).

The District Court ordered arbitration of the unresolved issues of wages and seniority. The United States Court of Appeals, Eighth Circuit affirmed.

ARGUMENT

The Union bases its claim for arbitration upon the contract provisions of the collective bargaining agreement in question. The decision of the Courts in this case has determined that the contract requires arbitration. Significantly, there is no disagreement between the opinions concerning the applicable law. The dissenting opinions disagree only in the interpretation, of the facts unique to this case.

The collective bargaining agreement between the Union and the Employer provides in Article XX, Section 1, that it "shall remain in full force and effect until August 8, 1973" (A. 30). Article XX, Section 2 provides that "either the Employer or the Union" shall have the right "to reopen" the subjects of "wages and seniority only" as of August 8, 1971 (A. 30). Both the Employer and the Union exercised the option provided for in Article XX, Section 2, to reopen the contract provisions on both seniority and wages by giving timely notice (prior to June 9, 1971) (A. 5, 30). The parties were unable to arrive at an agreement; the Union requested that the issues of wages and seniority be submitted to arbitration; the Employer refused to submit these issues to arbitration; and asserted (as it continues to assert) that the Union was prohibited from striking to protect the interest of the employees (A. 4-8).

In order to bring some stability into the relationship, it was necessary that the subject of wages and seniority be resolved; therefore, the Union brought this Declaratory Judgment Action on January 10, 1972 (A. 4), over six months after the issues of wages and seniority were open. Since the contract provides arbitration as the means of resolving disputes between the Union and the Employer (A. 10, Article I), it is urged that the Court has properly ordered arbitration.

The contract does not define grievances or disputes. It does not in any manner limit what is to be submitted to arbitration. The Union urges that the intent and the clear and explicit language of Article I requires that the issues of wages and seniority for the period from August 8, 1971, to the expiration of the contract, be submitted to arbitration. Article I of the contract specifically provides, "It is the intent and purpose of the parties hereto * * * to provide procedures for the prompt, and equitable adjustment of all * * * disputes arising between the Employer and the Union * * *" (A. 10). Thir is in addition to grievances and disputes between the Employer and any employee which are also specifically covered by the agreement (A. 10). The contract does not contain any exceptions to its coverage of disputes arising between the Employer and the Union. Its purpose is to cover all disputes between the Employer and the Union. Therefore, the contract must be looked to for the procedures to be followed for "the prompt, and equitable adjustment of all * * * disputes arising between the Employer and the Union * * *" (A. 10). Since the contract specifically prohibits strikes and lockouts (A. 20), the only procedure in the contract for such adjustment is that of arbitration, which is provided for in Article XIV, Section 5 (A. 21, 25).

Article XIV, Section 5 (A. 21) contains a provision relied upon by the Employer to the effect that the arbitrator shall not have power to add to, subtract from, or change the terms of the contract. This provision, the Union urges, simply provides that the arbitrator is bound by the terms of the contract as they exist. In the event that the arbitrator was adjusting an employee's grievance, e.g. a question of vacations, then the arbitrator would have to apply the terms of the contract. The arbitrator could not change them, add to them, or subtract from them to cover that particular grievance or achieve the result he deemed proper. In the instant case, however, the contract provisions concerning wages and seniority have been reopened. They are no longer in effect or binding. There are no contract terms to

be changed, added to or subtracted from. The terms of wages and seniority for the contract period after August 8, 1971, are the very items that must be resolved by arbitration. The language of Article XX, Section 2 recognizes that after reopening, the reopened provisions of the contract are no longer part of the contract terms (A. 30). Otherwise, the last sentence of that section which provides, "In the absence of such notice, the existing conditions shall continue to remain in effect until the expiration date of the agreement" (A. 30), would be meaningless.

In view of the language of Article XX, Section 2 stating in effect that the wage and seniority provisions of the contract shall no longer be in effect if notice to reopen is given, to deny arbitration of these disputes would leave the parties in the position of having an incomplete contract for the remaining term of the contract as the contract would lack vital provisions on wages and seniority for the period beginning August 8, 1971.

Since the parties have not been able to reach an agreement under the provisions of Article XX; since the contract still is in effect; and since the parties have contracted against a strike and lockout, the only procedure remaining to resolve the disputes between the Employer and the Union, under the contract, concerning the issues of wages and seniority, is arbitration. Common experience establishes that the parties would have had to either include a right to strike and lockout, or an arbitration agreement to dispose of the issues if the contract was to have any meaning for the contract period remaining after the reopening of certain provisions.

The no strike, no lockout provision was the quid pro quo of the agreement to resolve all disputes between the Employer and the Union by arbitration. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 US 448 (1957).

Since the collective bargaining agreement in question is said to provide procedures for the settlement of *all disputes* (A. 10,

Article I) and contains a *no strike clause* (A. 20, Article XIII) both without exception, the arbitration clause should be applied to the disputes in question. There is no exception in the no strike clause and none therefore should be read into the grievance clause. *United Steel Workers of America v. American Manufacturing Company*, 363 US 564 (1960). Without the right to strike, the reopening provisions of the contract leave the parties without an agreement on the vital issues of wages and seniority, unless there is a right to arbitration.

Arbitration is favored to settle industrial disputes and should not be denied unless clearly excluded by the agreement. It cannot be said (to paraphrase the language of this Court in *United Steel Workers of America v. Warrior and Gulf Navigation Company*, 363 US 574, 1960), "with positive assurance that the arbitration clause is not susceptible of an interpretation" of coverage of the disputes in issue in this case; this is especially true when the parties have not "specifically excluded" the arbitration of the disputes involved in this case. Even if there were such an exclusion in the contract "only the most forceful evidence of a purpose to exclude" would justify the exclusion from arbitration coverage. This is especially true in view of the broad language and coverage of Article I of the contract (A. 10). Therefore, the Courts under the contract language applicable to this case properly ordered arbitration.

The Employer in its Petition implies that the prospective nature of the matters to be arbitrated as beyond the arbitration process. A review of reported cases, however, indicates that except where such prospective terms are specifically exempted or not covered, the Courts have enforced such agreements as the Courts' decisions in the instant case enforce the agreement. A case in point is *Builders Association of Kansas City v. Greater Kansas City Laborers District Council of the International Hod Carriers, Building and Common Laborers Union of America of Greater Kansas City and Vicinity*, 213 F.Supp. 429 (Mo., D.C.,

1963), 217 F.Supp. 1 (Mo. D.C. 1963), 326 F.2d 867 (C.A. 8, 1964), cert. denied, 377 U.S. 917 (1964), where an arbitration clause provided that there would be no work stoppages and that disputes would be arbitrated. The parties agreed to the establishment of a health and welfare fund under a trust agreement which was to be agreed upon by the parties. The parties failed to reach an agreement on the trust declaration and the Court ordered arbitration.

In *Northland Greyhound Lines, Inc. v. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America*, 66 F.Supp. 431 (D.C., Minn., 1946) appl. dis'd (C.A. 8, 1946), 157 F.2d 329, the Court ordered arbitration of prospective terms of a contract relating to wages, hours, etc., even before Section 301, Labor Management Relations Act (29 USC Sec. 185) was enacted.

Other courts have also recognized that Section 301, Labor Management Relations Act (29 USC Sec. 185) suits may be used to compel quasi-legislative (arbitration dealing with establishing new contract terms) as well as quasi-judicial (arbitration dealing with interpretation of rights and duties under established contract provisions) arbitration. *Winston-Salem Printing Pressmen, etc. v. Piedmont Publishing Co., etc.*, 263 F.Supp. 952 (Md. D.C. 1967), aff'd 393 F.2d 221 (C.A. 4, 1967); *A. Seltzer & Co., Inc., et al. v. Livingston of Dist. 65, R.S.D.S.U.*, 253 F.Supp. 509 (N.Y.D.C., 1966) aff'd 361 F.2d 218 (C.A. 2, 1966); *Division No. 892, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. M K & O Transit Lines*, 210 F.Supp. 351 (Okla. D.C. 1962), rev'd other gds., 319 F.2d 488 (C.A. 10, 1963); cert. denied 375 US 944 (1963).

Cases cited by the Employer as being in conflict with the decision in this case, are distinguishable. *West Coast Telephone Company v. IBEW Local 77*, 431 F.2d 1219 (C.A. 9, 1970),

dealt with reformation of a written contract that was at variance with the terms agreed upon during negotiations. *RCA v. Association of Scientists*, 414 F.2d 893 (C.A. 3, 1969), dealt with a contract that provided specifically that if the terms were not agreed upon that the Union had a right to strike to enforce its demands. *Federal Labor Union v. Midvale-Heppenstall Co.*, 421 F.2d 1289 (C.A. 1970), dealt with contract provisions which provided in effect that the contract could be amended by mutual agreement rather than the absolute right to reopen which existed in the instant case. *International Union of Operating Engineers Local 279 v. Sid Richardson Carbon Co.*, 471 F.2d 1175 (C.A. 5, 1973), dealt with the question of whether contract provisions were broad enough to cover the questions of accretion and representation. *International Union of Electrical Workers v. General Electric Company*, 407 F.2d 253 (C.A. 2, 1968), cert. denied 395 U.S. 904 (1969), dealt with a particularly complex arbitration provision which the Court suggested resembled a trust indenture, and ordered arbitration of four of seven issues in dispute. *NLRB v. Burns International Security Service*, 406 U.S. 297 (1972), dealt with the question of whether the Employer was bound by another Employer's contract where the Employer was not a successor Employer. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), dealt with the power of the National Labor Relations Board to impose contract terms as a remedy for an 8(a)(5) refusal to bargain unfair labor practice.

CONCLUSION

Certiorari should be denied for the reason that the lower court properly determined factually that the contract in this case required arbitration of the disputes in issue. There is no conflict between the decision in this case and reported decisions of other courts of appeals. There are no questions of Federal

law involved which have not been settled by this Court. The decision does not conflict with applicable decisions of this Court.

Respectfully submitted

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